SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 846

MILK WAGON DRIVERS' UNION, LOCAL 753, OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, STABLEMEN AND HELPERS OF AMERICA, ROBERT G. FITCHIE, J. G. KENNEDY AND STEVE C. SUMNER, EACH INDIVIDUALLY AND AS MEMBERS AND PRESIDENT, VICE-PRESIDENT AND SECRETARY-TREASURER, RESPECTIVELY, OF THE SAID LOCAL 753,

vs.

BERNARD FICHTER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

The Opinion of the Court Below.

The decision of the Supreme Court of Illinois reversing the judgment of the Appellate and Circuit Courts is reported in 46 N. E. 2nd 921. The petition for rehearing was denied without opinion.

B.

Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28 U. S. C. A., Section 344(b), (Judicial Code, Section 237(b), as amended by the Act of February 13, 1925).

The Federal Question.

The first Supreme Court decision expressly determined that there was evidence in the record supporting the jury's finding as to the existence of a dispute between the parties over the payment of the death benefit claim:

> "There is in the record, however, evidence tending to support the existence of a dispute and from these facts we are unable to say that there was no evidence before the jury which, considered with all its reasonable intendments, could not be said to support the issues of fact as to ratification and accord and satisfaction, as to which the jury found against the plaintiff. An affirmance of the verdict of the jury by the Appellate Court settles that issue of fact and such finding is binding on this court.

The second Supreme Court decision, without in any way qualifying, differentiating, or even mentioning the first decision, held that there was no dispute between the parties:

> "How can there be said to be a bona fide dispute when appellee without objection paid the sums due under the 1922 bylaws for over eight years? Apparently the theory is that by amending the constitution they have created a bona fide dispute by their own act."

Accordingly, the federal question—denial of hearing and due process by disregard of the jury's findings—did not arise until after the rendition of the second Supreme Court

decision and could not have been presented prior to that time. Following such decision, the defendants raised the question in a petition for rehearing, which petition in part stated as follows (R. 138):

> "We further respectfully submit that the record herein presented disputed issues of fact for the jury to pass upon, and that the verdict of the jury against the plaintiff, affirmed by the Appellate Court, is conclusive upon this Court and is not subject to review; that the decision of this Court reversing the judgment and directing the Circuit Court to enter a judgment in favor of the plaintiff deprives the defendants herein of their right to trial by jury as guaranteed by Section 5 of Article 2 of the Illinois Constitution."

While, ordinarily, a federal question raised for the first time on petition for rehearing of the final decision or judgment of the State Supreme Court is raised too late, this rule does not apply when the federal question could not have been raised at an earlier time, as where the grounds of the Supreme Court's decision supply a new and unexpected basis for a claim of a denial of a federal right. As stated in *Herndon* v. *Georgia,* 295 U. S. 441:

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. * * *
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> "Petitioner, however, contends that the present case falls within an exception to the rule—namely, that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the federal claim was timely if the ruling of the state court could not have been antici-

pated and a petition for rehearing presented the first opportunity for raising it. Saunders v. Shaw, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638; Ohio ex. rel. Bryant v. Akron Metropolitan Park Dist. 281 U. S. 74, 79, 74 L. Ed. 710, 715, 50 S. Ct. 228, 66 A. L. R. 1460; Missouri ex. rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. Ed. 870, 875, 50 S. Ct. 326; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 677, 678, 74 L. Ed. 1107, 1111, 1112, 50 S. Ct. 451; American Surety Co. v. Baldwin, 287 U. S. 156, 164, 77 L. Ed. 231, 236, 53 S. Ct. 98, 86 A. L. R. 298; Great Northern R. Co. v. Sunburst Oil & Ref. Co., 287 U. S. 358, 367, 77 L. Ed. 360, 367, 53 S. Ct. 145, 85 A. L. R. 254."

The Supreme Court, in denying the petition for rehearing, necessarily passed upon the constitutional claim.

C.

Statement of the Case.

This Court, of course, has no concern with the merits of the present case; that is, whether the union had the right or power under its constitution to amend its by-laws in respect to the payment of sick benefits, and whether, under the laws of the State of Illinois, accord and satisfaction had been reached by plaintiff's acceptance of defendants' payments, without protest, in full satisfaction of plaintiff's claim. The only issue before this Court is the issue of whether defendants were deprived of a hearing and of due process of law by the second decision of the Supreme Court, wherein the court substituted its findings for the findings of the jury. In this connection it should be noted in particular that in its first decision the Supreme Court expressly held that there did exist evidence sufficient to show the existence of a dispute concerning the claim and to support the jury's verdict. As will be shown, there was in fact ample and competent evidence in the record to

support such verdict. (It is the law in Illinois as elsewhere, as announced in both of the decisions involved in this case, that in order for any consideration to attach to the acceptance of a lesser sum in settlement of a greater sum a bona fide dispute between the parties as to what was owing must exist.) In the second Supreme Court decision this finding was expressly ignored, and the Court held, in complete disregard of the jury's findings, that no dispute existed. The court's attention was directed, under a petition for rehearing, to this fact and to the fact that the court had in effect deprived defendants of a hearing, but the court denied the petition, and thus the issue is now before this Court as the only tribunal available.

D.

Specification of Errors.

1. The decision of the Supreme Court of Illinois was erroneous in that it denied petitioners a right to hearing, and deprived them of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of Illinois erred in disregarding the factual findings of the jury that a dispute existed as to the amount of money owing under the sick benefit by-laws, and in holding because of such assumption that no consideration existed for the agreement to accept the lesser sum in payment of the greater and that the defendants were liable for the greater sum.

3. The Supreme Court of Illinois erred in reversing the judgment of the Appellate Court and of the Circuit Court of Cook County and in remanding the cause to the Circuit Court with directions to enter judgment in favor of the plaintiff.

E.

Argument.

Before determining whether the court deprived defendants of a hearing by arbitrarily overriding the jury verdict on the question of the existence of a bona fide dispute between the parties, it is necessary to determine a preliminary question—namely, was the question of the existence of a bona fide dispute between the parties concerning the amount owing under the by-laws submitted to and determined in favor of defendants by the jury on the basis of competent evidence?

That the question of whether there was a bona fide dispute between the parties so as to afford consideration for the acceptance of a lesser in payment of a greater sum is a question of fact for the jury was plainly stated by the Supreme Court in its first decision, where it held:

> "Whether there was an accord and satisfaction or a ratification were issues of fact tried before the jury."
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> "On the question of fact as to whether there was a dispute between plaintiff and the Union as to the amount of sick benefits due him, such facts as exist are to be deduced from the actions of the parties."
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> "There is in the record, however, evidence tending to support the existence of a dispute and from these facts we are unable to say that there was no evidence before the jury which, considered with all its reasonable intendments, could not be said to support the issues of fact as to ratification and accord and satisfaction, as to which the jury found against the plaintiff. An affirmance of the verdict of the jury by the Appellate Court settles that issue of fact and such finding is binding on this court."

See also *Shirley* v. *Ellis Drier Co.*, 379 Ill. 105, where the court stated:

> "All of the facts in this connection should be submitted to a jury. The same is true with respect to the check for $500 mailed by appellant to respondents, claimed to be in full settlement. In ascertaining whether this was received as, in effect, an accord and satisfaction, the language of the correspondence, the surrounding circumstances, whether there was a bona fide dispute, and the length of time the money was retained, are all questions for determination by a jury."

The accord and satisfaction issue was presented to the jury (in fact, was the only issue before the jury, the question of the legality of the union change in by-law being solely a question of law), and the jury returned a verdict in favor of defendants and against plaintiff (R. 21). That there was ample and competent evidence to support the jury's factual finding that there did exist a bona fide dispute between the parties concerning the amount of money due plaintiff is expressly stated in the first Supreme Court decision, where the Court said:

> "On the question of fact as to whether there was a dispute between plaintiff and the Union as to the amount of sick benefits due him, such facts as exist are to be deduced from the actions of the parties. Plaintiff admits that the Union notified him early in January, 1936, of the amendment to the by-laws and that the Union would pay him ninety-two payments of $20 each and no more; that he accepted such payments without protest and that when he presented himself at the Union headquarters for the ninety-second or last payment he knew the Union was paying him that $20 as in full of all such benefits under such membership, and with that knowledge he accepted the same without protest. The first evidence of want of agreement on his part was the commencement of this suit."

* * * * * * *

"Where there is a disputed claim the plaintiff will not be permitted to assert that he did not understand that the sum of money offered him was in full of his demand. He is bound either to reject the check, or, by accepting it, to accede to defendant's terms. (*Fuller* v. *Kemp*, 138 N. Y. 231, 33 N. E. 1034; *Nassoly* v. *Tomlinson*, 148 N. Y. 326, 42 N. E. 715.) It seems clear from the facts and circumstances, first, that when plaintiff received the notice from the Union in January, 1936, he knew that they would not pay him any more than ninety-two payments of $20 each, and that he also knew when he received the ninety-second weekly payment and the withdrawal card was handed to him, that the Union was paying him $20 in full, and as final payment for sick benefits. His acceptance of the same and the withdrawal card was evidence proper to be considered on the question whether he had ratified the amended by-laws and whether there was an accord and satisfaction. The record indicates the position of the defendant to have been as stated in its pleadings, i.e., that upon the adoption of the amendment to the by-laws, effective January 1, 1936, defendant did not owe the plaintiff anything, and although the plaintiff, in accepting the ninety-two payments, raised no protest, such fact cannot be said to show that there was no dispute between the parties, as his suit, started soon after receipt of the ninety-second payment, indicates such dispute. If the amendment was valid and binding on the plaintiff, as defendant believed it to be, defendant would not be required to make any further payment of sick benefits to the plaintiff, since it contained no provision upon which to base payment of further benefits after the payment to him of benefits under the old by-laws for a period of more than seven years. Plaintiff says the amendments are invalid as to him and he so says in his pleadings. There is in the record, however, evidence tending to support the existence of a dispute and from these facts we are unable to say that there was no evidence before the jury which, considered with all its reasonable intendments, could not be said to

> support the issues of fact as to ratification and accord and satisfaction, as to which the jury found against the plaintiff. An affirmance of the verdict of the jury by the Appellate Court settles that issue of fact and such finding is binding on this court. This being so, it becomes unnecessary to consider whether the amendment to the by-laws was valid as applied to plaintiff."

The facts above mentioned by the court are found in the record as follows: (R. 28-30, 36-37, 45, 72, 75-77).

Defendants acted in perfect good faith in amending their by-law in accordance with what they considered their legal right under Section 74 of the constitution, providing for the amendment of by-laws, and under the law of the State of Illinois, and at the very least a bona fide dispute concerning the validity of the change existed between the parties. See *Jenkins* v. *Talbot,* 338 Ill. 441, where the court said:

> "The condition confronting the society in June 1929 justified grave apprehensions as to its continuing ability to meet its obligations as they matured. The danger of insolvency may not have been immediately imminent, but the tendency in that direction was sufficiently apparent to require those charged with the duty of managing the affairs of the society to prevent the threatened disaster."
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> "The certificate is not a contract to pay a certain amount at all events on the payment of a stipulated sum, but as part of that contract appellants agreed to be bound by any by-law subsequently adopted by the order, subject only, as hereinbefore stated, to the conditions that it be not unreasonable or tainted with fraud. The early policy pursued by this society spelled certain ruin. Surely no one can have a vested right in a disaster."

See also *Murphy* v. *Novak,* 223 Ill. 301, where the Illinois Supreme Court stated:

> "The right of a beneficiary society to amend its by-laws so as to affect contracts already in force, where its contract with a member contains an express provision reserving to the society the right to amend or change its by-laws, which changes, it is provided, shall be binding upon the member, has been recognized by this Court in numerous cases."

Unless there was some dispute about the rights of the plaintiff under the new by-laws and some settlement negotiated between the parties, there was no reason for notifying the plaintiff of the new by-laws and that he would receive only 92 more sick benefit payments. There was no reason for the Union to make the 92 payments to the plaintiff when under the new by-laws he was not entitled to any. There was no reason for the plaintiff to accept without protest any less than he was entitled to under the old by-laws. There was no reason for the voluntary withdrawal of his membership from the Union.

The foregoing is the state of the case prior to the second Supreme Court decision. In its second decision the Illinois Supreme Court completely disregarded the jury's verdict on the issue of the existence of a bona fide dispute between the parties, completely disregarded its own determinations and that of the Appellate Court for the First District respecting the existence of evidence to support this finding, and without attempting to distinguish or qualify the first decision in any way whatsoever (there was not even any mention that the court had had the matter before it in a previous decision) the court simply announced as follows:

> "It is also contended that the acceptance by appellant for the period of ninety-two weeks of $20 constituted an accord and satisfaction of what was due under the by-laws in existence at the time he was injured.

> One of the absolute essentials of an accord and satisfaction is that there exists a bona fide dispute as to an amount due between the parties. (*In re Estate of Cunningham,* 311 Ill. 311; *Shirley* v. *Ellis Drier Co.,* 379 id. 105.) How can there be said to be a bona fide dispute when appellee without objection paid the sums due under the 1922 by-laws for over eight years? Apparently the theory is that by amending the constitution they have created a bona fide dispute by their own act. We have been referred to no case, and we believe none can be cited, which authorizes one party to a contract, which is in course of performance, to create a situation which changes the vested rights of the parties, and then contend that the situation thus brought about creates a bona fide dispute which will authorize the payment of a less sum in satisfaction of a greater."

It is submitted that the foregoing action of the Supreme Court of Illinois, in disregarding the finding of a jury on an issue submitted to the jury for determination, and in support of which verdict there admittedly existed competent evidence, constitutes a denial of a hearing by depriving defendants of the trial by jury which was the hearing procedure adopted in this case according to the practice in the Illinois courts, and that any judgment rendered against the defendants by such determination of the Supreme Court deprives defendants of property without due process of law, in violation of the Fourteenth Amendment.

The Supreme Court, exclusively an appellate body, has sought to substitute itself for the jury as the trier of the facts. Thereby it deprived defendants of a determination by an impartial tribunal to which the issues had been submitted in accordance with the regular Illinois practice, before which tribunal the parties had appeared, witnesses had been examined and evidence presented. If the findings of the jury are to be arbitrarily disregarded and its function usurped, there might just as well have been no hearing before the jury at all.

It is, of course, elemental that due process requires a hearing before some impartial tribunal, be it jury, bench, board or commission, which tribunal is set up for the purpose of determining questions of fact. *Brown* v. *Mississippi*, 297 U. S. 278. The hearing which must precede the taking of property is not a mere form; the owner must have the right to secure and present evidence and be given the opportunity, by proof, to controvert the claim asserted against him before a tribunal bound to listen and to give legal effect to what has been established, which tribunal has been set up for that purpose. *Washington* v. *Fairchild*, 224 U. S. 510.

The right to present evidence and to have that evidence determined by an impartial tribunal sitting as a trier of the facts is indispensable to due process. A case bearing a close analogy to the present case is *Saunders* v. *Shaw*, 244 U. S. 317, in which a state supreme court reversed a trial court and entered final judgment for the defendant, but in so doing deprived plaintiff of a right to introduce certain evidence which the trial court had deemed immaterial but which the supreme court determined was material. This determination by the state supreme court was held by this Court to deprive of property without due process of law, for the reason that plaintiff was deprived of an opportunity to introduce rebuttal evidence to be considered by the trier of the facts, and thus was deprived of a hearing.

This Court has held in numerous decisions that due process of law requires a hearing. (*Postal Telegraph-Cable Co.* v. *Newport*, 247 U. S. 464), and that such right to be heard must be in accordance with the usual course of law in such cases. *Frank* v. *Mangum*, 237 U. S. 309; *Garland* v. *Washington*, 232 U. S. 642; *Rogers* v. *Peck*, 199 U. S. 425. The notice and hearing must correspond, and the relief granted must be appropriate to that which has been heard

and determined on such notice. *Standard Oil Co.* v. *Missouri,* 224 U. S. 270.

It is, of course, true that due process of law does not require a trial by jury. However, due process does require a procedure in accordance with the settled course of judicial proceedings as recognized in the state by the laws of the state. *Walker* v. *Sauvinet,* 92 U. S. 90. Where, as is the case in Illinois, the regular court procedure is trial by jury, and where, as in the present case, the trial by jury actually was had and the issues and evidence were actually submitted to the jury for the purpose of having factual issues determined by that jury, due process requires that the jury's determinations, if supported by evidence, be given effect, or else the state courts would not be acting in consonance with the constitutional laws of the state and its own procedure in accordance with the usual course of law in such cases. As stated before, any other rule would permit substitution of the appellate court, which is not set up as a trier of facts, for the jury, with the consequent elimination of an actual hearing before some tribunal set up to determine the factual issues. Analogous cases are those in which convictions of Negroes by juries from which Negroes have been excluded are set aside as depriving of life and liberty without due process of law, the reasoning being that, although a jury trial might not have been necessary in the first instance, if a trial by jury is resorted to the jury must be an impartial one, capable of impartially determining the factual issues so that the determination can be given weight and afford a basis for the judgment. See *Brown* v. *New Jersey,* 175 U. S. 172; *Rawlins* v. *Georgia,* 201 U. S. 638; *Strouder* v. *West Virginia,* 100 U. S. 303; *Franklin* v. *South Carolina,* 218 U. S. 161.

Petitioners therefore appeal to this Honorable Court to prevent abridgment of their constitutional rights by the

Supreme Court of Illinois, whereunder petitioners have been deprived of valuable property rights without being accorded a proper hearing.

Respectfully submitted,

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EXHIBIT "A".

Docket No. 26618—Agenda 19—May, 1942.

BERNARD FICHTER, Appellant,

v.

MILK WAGON DRIVERS' UNION, LOCAL 753, et al., Appellees.

Mr. Chief Justice STONE delivered the opinion of the court:

Bernard Fichter, plaintiff, appellant, filed in the circuit court of Cook County, a suit against the Milk Wagon Drivers' Union, Local 753, etc., and others, to recover the sum of $3193 claimed by him to be due as sick benefits under the by-laws of that Union. Trial was had before a jury which returned a verdict against him. On appeal to the Appellate Court, First District, the judgment entered on that verdict was affirmed.

The facts are susbtantially as follows: Fichter became a member of the Milk Wagon Drivers' Union, Local 753, in 1920, and on June 15, 1928 sustained permanent injury as the result of an accident while driving a milk wagon. At the time of such disability the by-laws of the union, adopted in 1922, provided sick benefits of $20 per week for each member in good standing who was so afflicted, and $2 per week extra for a wife and the same for each child under 16 years of age. There is no question here about whether the injuries and resulting disability of the plaintiff brought him within the definition of the term "sickness," since the union paid him the so-called sick benefits for a period of over seven years.

In December, 1935, the Union Local amended its by-laws as to sick benefits, by which amendment payments to the wife and minor children were omitted and benefits of $20 per week were authorized, with a maximum of twelve weeks benefit to one having a membership of one year, and twelve additional weekly benefits for each additional year of continuous service up to and including the tenth year. After ten years continuous employment in good standing members were entitled to benefits for full time of sickness. Prior to this amendment plaintiff had been paid, each week,

benefits ranging from $26 to $35 per week depending on the number of his family coming within the provisions of the by-laws. Section 74 of the constitution and by-laws of the Union authorizes amendment of the by-laws and gives the procedure for so doing.

When the amendment of December, 1935, became effective, the defendant, by its officer, notified the plaintiff that they would "carry" him for ninety-two weeks more at $20 per week instead of $26 which he had been receiving theretofore, and that after that time he would be done. Plaintiff made no protest on receiving this notice but accepted and cashed the checks for $20 per week for a period of ninety-two weeks. Shortly after he had received the ninety-second payment, which was the last, he filed this suit alleging that he was entitled to receive the payment of $26 per week under the by-laws of 1922, and that the amendment of 1935 was not binding on him. At the time of the last payment plaintiff was handed a withdrawal card from the Union, which he accepted and retained until the time of the trial and offered it in evidence. This card stated that the bearer "whose name appears on the margin of this card in his own handwriting" has paid all dues and demands and has withdrawn in good standing from the Local. The card also states that it entitles him to re-admission to the Local Union from which the card was issued, unless otherwise ordered by that Local. Though Fichter retained this card, he did not sign his name to it.

The record presents two principal questions: (1) Is the amended by-law legal as applied to plaintiff? (2) Did plaintiff, by his actions in accepting payments after the adoption of the new by-laws, ratify them and create an accord and satisfaction of his claim? The latter question will be first considered.

Whether there was an accord and satisfaction or a ratification were issues of fact tried before the jury. Those issues of fact were found in favor of the defendant. The Appellate Court affirmed that finding. The question presented here, therefore, on this branch of the case, is whether there is any evidence which, when viewed in the light of its reasonable intendment, tended to establish a ratification or an accord and satisfaction. If there is such evidence,

this court is bound by the finding of the Appellate Court in accord with the verdict of the jury on that issue. (*Seiders v. Henry,* 347 Ill. 467; *Martin v. Central Trust Co.,* 327 id. 622; *Phillabaum v. Lake Erie and Western Railroad Co.,* 315 id. 131.) This is true quite aside from the question whether as a matter of law the amended by-law could legally apply to plaintiff.

Plaintiff argues that minds of all reasonable men would agree that the record shows a total absence of any evidence tending to prove ratification or accord and satisfaction. Plaintiff concedes that his conduct in accepting the ninety-two payments, after receipt of notification of the amendment of the by-laws, indicated that he knew he would be entitled to no further payments of sick benefits after such ninety-two payments were made to him, and he concedes also that such amounted to an implied consent to accept a new contract for the payment of benefits but argues that such contract is not supported by any consideration. To furnish consideration for an agreement for an accord and satisfaction, for a sum less than the creditor claims is due, an actual dispute or disagreement between the parties must be in existence. (*In re Estate of Cunningham,* 311 Ill. 311; *Scheffenacker v. Hoopes,* 113 Md. 111, 77 Atl. 130.) However, the fact that settlement is completed on the basis of receipt by the creditor of considerably less than he could have recovered, or that he was ignorant of legal rules governing such settlement, is not sufficient reason for disregarding the settlement by him with full knowledge of the facts. (*In re Estate of Cunningham, supra; Janci v. Cerny,* 287 Ill. 359.) Where a check is offered under such circumstances as amounts to a condition that it is received in full payment of a demand, acceptance will satisfy the demand even though the creditor protests at the time that it is not all that is due him or that he does not accept it in full satisfaction of his claim. An acceptance of such is an acceptance of the condition notwithstanding any protest he may make to the contrary. *Kall* v. *Block Co.,* 319 Ill. 339; *In re Estate of Cunningham, supra; Janci v. Cerny, supra; Royal Colliery Co. v. Alwart Bros. Coal Co.,* 276 Ill. 193; *Canton Union Coal Co. v. Parlin & Orendorff Co.,* 215 id. 244.

On the question of fact as to whether there was a dispute between plaintiff and the Union as to the amount of sick benefits due him, such facts as exist are to be deduced from the actions of the parties. Plaintiff admits that the Union notified him early in January, 1936, of the amendment to the by-laws and that the Union would pay him ninety-two payments of $20 each and no more; that he accepted such payments without protest and that when he presented himself at the Union headquarters for the ninety-second or last payment he knew the Union was paying him that $20 as in full of all such benefits under such membership, and with that knowledge he accepted the same without protest. The first evidence of want of agreement on his part was the commencement of this suit. The rule is that where payment of a part of a demand is received in full settlement thereof, the concession by each party is a consideration for the concession by the other. *Manse v. Hossington,* 205 N. Y. 33, 98 N. E. 203; *Laroe v. Sugar Loaf Dairy Co.,* 180 N. Y. 367, 73 N. E. 61.

Where there is a disputed claim the plaintiff will not be permitted to assert that he did not understand that the sum of money offered him was in full of his demand. He is bound either to reject the check, or, by accepting it, to accede to defendant's terms. (*Fuller v. Kemp,* 138 N. Y. 231, 33 N. E. 1034; *Nassoiy v. Tomlinson,* 148 N. Y. 326, 42 N. E. 715.) It seems clear from the facts and circumstances, first, that when plaintiff received the notice from the Union in January, 1936, he knew that they would not pay him any more than ninety-two payments of $20 each, and that he also knew when he received the ninety-second weekly payment and the withdrawal card was handed to him, that the Union was paying him $20 in full, and as final payment for sick benefits. His acceptance of the same and the withdrawal card was evidence proper to be considered on the question whether he had ratified the amended-by-laws and whether there was an accord and satisfaction. The record indicates the position of the defendant to have been as stated in its pleadings, i. e., that upon the adoption of the amendment to the by-laws, effective January 1, 1936, defendant did not owe the plaintiff anything, and although the plaintiff, in accepting the ninety-two payments raised

no protest, such fact cannot be said to show that there was no dispute between the parties, as his suit, started soon after receipt of the ninety-second payment, indicates such dispute. If the amendment was valid and binding on the plaintiff, as defendant believed it to be, defendant would not be required to make any further payment of sick benefits to the plaintiff, since it contained no provision upon which to base payment of further benefits after the payment to him of benefits under the old by-laws for a period of more than seven years. Plaintiff says the amendments are invalid as to him and he so says in his pleadings. There is in the record, however, evidence tending to support the existence of a dispute and from these facts we are unable to say that there was no evidence before the jury which, considered with all its reasonable intendments, could not be said to support the issues of fact as to ratification and accord and satisfaction, as to which the jury found against the plaintiff. An affirmance of the verdict of the jury by the Appellate Court settles that issue of fact and such finding is binding on this court. This being so, it becomes unnecessary to consider whether the amendment to the by-laws was valid as applied to plaintiff.

The judgment of the Appellate Court is affirmed.

Judgment Affirmed.

EXHIBIT "B".

Docket No. 26618—Agenda 58—November, 1942.

Bernard Fichter, Appellant, *v.* Milk Wagon Drivers' Union, Local 753, et al., Appellees.

Mr. Justice GUNN delivered the opinion of the court:

Bernard Fichter, plaintiff-appellant, filed in the circuit court of Cook County a suit against Milk Wagon Drivers' Union, Local 753, et al., to recover the sum of $3193 claimed to be due as sick benefits under the bylaws of that union. Trial was had before a jury, which returned a verdict against him, and on appeal to the Appellate Court for the First District the judgment of the circuit court was affirmed.

The facts are substantially as follows: Fichter became a member of the Milk Wagon Drivers' Union in 1920, and June 15, 1928, sustained a permanent injury as the result of an accident while driving a milk wagon. During all of this time he was paying monthly to the union, benefit dues in addition to the regular union dues, as provided by the bylaws. At the time of such disability the bylaws of the union, adopted in 1922, provided sick benefits of $20 per week for each member in good standing, and $2 per week extra for a wife, and the same for each child under the age of sixteen years. The bylaws in force at the time of the injury read: "A sick benefit shall be paid to members in good standing of twenty dollars ($20.00) per week. * * * As soon as 90 days of benefit has been paid a member, if he is still sick, his dues stop and he draws two ($2.00) dollars per week extra for his wife and each child under 16 years."

Appellant, as a result of his injuries, became afflicted with chronic thrombophlebitis of both legs, which means the destruction of the deep seated veins; his legs were ulcerated, swollen, discolored and hardened. He had been treated for eight years by physicians of the union and many other doctors. He spent two and one-half years under care of the General Electric Company clinic, and after 1935 spent two years in the Cook County Hospital, and still is in a chronic and continuous state of ill health. No evidence was offered by defendant disputing this condition, or that it still exists, but, on the contrary, it continued to pay sick benefits under the 1922 bylaws from June, 1928, until January, 1936, without objection. There is no doubt plaintiff was sick, and the payments by the appellee so admit, and appellant came clearly within the definition of sickness under said bylaws.

In December, 1935, the union local amended its bylaws as to sick benefits, by which payments to a wife and minor children were omitted, and benefits of $20 per week were authorized, with a maximum of twelve weeks benefit to a member having a membership of one year, and twelve additional weekly benefits for each additional year of continuous service up to and including the tenth year. After ten years of continuous employment in good standing, members were entitled to benefit for full time of sickness. Prior

to this amendment plaintiff had been paid each week benefits ranging from $26 to $35, depending upon the number of his family coming within the provisions of the bylaws. Section 74 of the constitution and bylaws of 1922 of said union authorizes amendment of the bylaws and gives the procedure for so doing.

When the amendment of December, 1935, became effective the defendant notified plaintiff they would "carry" him for ninety-two weeks at $20 per week instead of what he had been receiving, and that after that time he would be done. Plaintiff made no reply to this notice, but accepted it and cashed checks for $20 for the period of ninety-two weeks. Shortly after he had received the ninety-second payment he filed his suit alleging he was entitled to receive the payment of $26 per week under the bylaws of 1922, and that the amendment of 1935 was not binding upon him. At the time of the last payment plaintiff was handed a withdrawal card from the union, and retained the same until the time of the trial, and offered it in evidence.

The record presents these principal questions: (1) Could the amended bylaws be applied to the claim of the plaintiff, which had accrued and was being paid at the time the amendment was made? (2) Is the plaintiff barred from bringing this suit because of an implied contract upon his part to conform to the 1935 bylaws, or because of ratification, or an accord and satisfaction?

Upon the first question it would appear upon principle that where a member had made his monthly benefit payments in accordance with the bylaws and became sick and entitled to a benefit, which was being paid, it would not be reasonable or just to allow payments to be avoided by the adoption of a bylaw discharging the debtor from liability. No authorities directly in point from this State have been cited, but such appears to be the rule in other jurisdictions. *Becker* v. *Berlin Beneficial Society,* 144 Pa. 232; *Maheu* v. *L'Union Lafayette,* 89 Atl. (Me.) 821; *Crnic* v. *Croatian Fraternal Union of America,* 89 S. W. (2d) (Mo.) 683; *Dotlich* v. *Slovene National Benefit Society,* 228 N. W. (Minn.) 608.

In *Becker* v. *Berlin Beneficial Society, supra,* which presented exactly the same question as here, the court said:

"Some time after the defendant society became liable to the plaintiff for dues at the rate of two dollars and fifty cents per week, and after it had paid them for more than one year, it proceeded to amend its bylaws so as to reduce the amounts of the benefits. This was certainly an easy mode of relieving the society from an obligation, and if successful, will doubtless be followed by other similar associations. The difficulty in the way of this convenient mode of paying debts is that it is repudiation pure and simple. The argument that the plaintiff, being a member of the society, is bound by the bylaws, does not meet the difficulty. It may be a good bylaw as to future cases, but at the time it was passed the plaintiff was something more than a member. He was a creditor whose rights had previously attached, and those rights cannot be swept away by such a scheme as this bylaw." We think this succinct statement is the law applicable to the present situation.

The cases cited in opposition are, upon examination, not found to be in opposition to this principle. The case of *Floyd* v. *Medroes,* 55 R. I. 163, has no application because it involved a question of whether there was any bylaw in force during the life of the member, which provided for a death benefit after his decease. The case of *Quigley* v. *Locomotive Engineers' Mutual Life & Accident Ins. Ass'n,* 279 N. Y. S. 858, also involved death benefits, and the amendments involved were made during the lifetime of the certificate holder, and by virtue of provisions in the constitution of the society. The case of *Grant* v. *Providence Permanent Firemen's Relief Association,* 53 R. I. 201, involved the amendment of a bylaw so that sickness meant a disability from doing some kind of remunerative work. This case is of no aid because the bylaws of 1922 in the instant case expressly provided for the payment of benefits during the period of illness. The case of *Pain* v. *Societe St. Jean Baptiste,* 172 Mass. 319, was modified by *Newhall* v. *American Legion of Honor,* 181 Mass. 111, and also distinguished, because in the first case the plaintiff had consented to be bound by new bylaws, not as a new contract, but as a part of the old contract and under its provisions. In *Stohr* v. *San Francisco Musical Fund Society,* 22 Pac. (Cal.) 1125, the general laws of the State gave a society the right to

repeal, alter or amend its bylaws, and in that case they also held that an amendment changing the contract could not be made if the payments were to continue as long as sickness continued. It will be observed that the bylaws in the present case provided that the benefits "will be paid for the entire period of illness, minus the first 7 days."

We entertain no doubt that bylaws changing appellant's rights after they had become vested would not bind him. Appellee claims, however, that the power reserved to amend the bylaws authorized the change made in the benefits payable to appellant. Section 74 of the constitution and bylaws of 1922 is as follows: "This Constitution and By-Laws can be amended as follows: Any three members may over their signature, present to the union, at any regular meeting, any amendment or alteration to this constitution, and after being read at two regular meetings, shall lay over to the next regular meeting when it shall be voted upon. If the amendment or alteration receives a two-thirds vote it is adopted." There is nothing in this section by which any member consents that any vested right may be taken from him.

In *The Covenant Mutual Life Ass'n* v. *Kentner,* 188 Ill. 431, where this question was discussed, we said: "It was stipulated that the bylaws contained a provision that they might be amended, revised or modified, but that is no more than the law would imply without the stipulation. Such power is implied from the general power to enact by-laws. (3 Am. & Eng. Ency of Law, (2d ed.) 1064; *Fullenwider* v. *Royal League,* 180 Ill. 621.) If a member agrees that future by-laws or amendments shall enter into and form a part of his contract and modify or vary it, he will be bound by such by-laws or amendments because they are a part of his contract * * * Even if the certificate states that the by-laws are a part of the contract and that they are subject to amendment, subsequent by-laws will be construed to apply only to contracts made after the adoption of such by-laws, in the absence of an agreement that they shall have a retrospective effect. This is upon the principle that all laws and by-laws have a prospective and not a retrospective effect, unless the intent that they shall have a retrospective

effect is clear and unmistakable. Unless there is an express agreement that a member shall be bound by future by-laws varying or modifying his contract, he is not so bound."

In *Peterson* v. *Gibson,* 191 Ill. 365, we held that a provision in the constitution of a mutual aid association that the constitution could be amended or changed by vote of the members could not be construed to authorize an amendment or change which should act retrospectively and impair the obligation of the contract, entered into between the association and the member, unless there was an express agreement to be bound by future bylaws, which affected the member's contract injuriously.

Section 74 of the bylaws was not sufficient to change or destroy the right of plaintiff, which became vested upon his becoming sick within the terms of said bylaws.

It is urged that the acceptance of $20 per week under the amended bylaws amounted to an implied contract to abide by and be bound by them. In *Cumber* v. *Wane,* 1 Strange, 425, it was held that giving a note for five pounds cannot be pleaded as a satisfaction for a debt of fifteen pounds, and following this it has been definitely held in Illinois that the payment of a lesser sum in satisfaction of a larger sum due and owing does not cancel the original obligation, even though expressly accepted in discharge thereof, because such a promise is without consideration.

In *Hayes* v. *Massachusetts Mutual Life Ins. Co.* 125 Ill. 626, in holding that the payment of the sum of $6045 in satisfaction of $12,000 due upon a life insurance policy did not bar the beneficiary from recovering the balance, we said, quoting from *Bailey* v. *Day,* 26 Maine, 88: "The authorities are numerous, and, it is believed, uniform, that the payment, in money, of a debt due and payable in money, by the debtor, at the place where he was bound to make it, of a sum less than the full amount, and at the same time an agreement of the creditor to discharge the residue, will not operate as a defense to a suit for the balance. The reason is obvious: The agreement of discharge is without consideration. * * * By the payment of a part, the defendants laid no foundation for an obligation in the plaintiff, but merely made discharge, *pro tanto,* for their own, which they

had long omitted. See also *Pinnel's case*, 5 Coke, 117; *Heathcote* v. *Crookshanks*. 2 T. R. 24; *Cumber* v. *Ware*, 1 Strange, 426." To the same effect see *Hart* v. *Strong*, 183 Ill. 349, and *Goldsborough* v. *Gable*, 140 id. 269. If appellee was unable to discharge its obligation under the original contract by express contract, it certainly would be unable to do so under an implied contract.

It is also contended that the acceptance by appellant for the period of ninety-two weeks of $20 constituted an accord and satisfaction of what was due under the bylaws in existence at the time he was injured. One of the absolute essentials of an accord and satisfaction is that there exist a *bona fide* dispute as to an amount due between the parties. (*In re Estate of Cunningham* 311 Ill. 311; *Shirley* v. *Ellis Drier Co.* 379 id. 105. How can there be said to be a *bona fide* dispute when appellee without objection paid the sums due under the 1922 bylaws for over eight years? Apparently the theory is that by amending the constitution they have created a *bona fide* dispute by their own act. We have been referred to no case, and we believe none can be cited, which authorizes one party to a contract, which is in course of performance, to create a situation which changes the vested rights of the parties, and then contend that the situation thus brought about creates a *bona fide* dispute which will authorize the payment of a less sum in satisfaction of a greater.

It is also contended apellee is bound upon the theory of ratification. This theory amounts to no more than the contention that the greater sum can be satisfied by the payment of the lesser. It is but urging in another way that appellee, through its own act in changing its bylaws, and paying the amount specified thereunder, may escape liability. In any of the cases in which it is attempted to satisfy a greater sum by the payment of a lesser, ratification could be claimed by the acceptance of a lesser sum. But as pointed out above, this defense is ineffective even in the case of an express agreement to take less, and hence ratification as an acquiescence in such lesser payments would be equally ineffective.

It is also contended by appellee that contracts of this type, made by a labor union, should be considered and decided upon a different basis than contracts of insurance or benefit companies, because of proof offered that the burden of its sick benefits under the bylaws of 1922 was greater than they had anticipated. The same contention was made in *Covenant Mutual Life Ass'n* v. *Kentner, supra,* where we said: "As to any other contract no one would think of saying that one party can annul the agreement and make another to suit its convenience without the consent of the other party, or that expediency or inability to continue business would warrant repudiating the contract and substituting another. Whatever theories might arise as to duties and obligations not founded upon contract, wherever there is a contract its terms must control the rights of the parties. The law does not undertake to make or modify contracts, whether relating to insurance or to some other subject, but it enforces contracts as the parties themselves have made them." We cannot accept the doctrine that a party competent to contract may, because of the peculiar nature of its organization, have a different law applied to it than other contracting parties.

At the close of the evidence in the case the plaintiff moved for a directed verdict, and also for a judgment notwithstanding the verdict, both of which were refused by the court. There is no dispute as to the facts in this case. The sickness of plaintiff is not denied; the failure to pay in accordance with the bylaws of 1922 is not disputed. The defenses alleged by appellee were not available as a matter of law, so the whole question resolved itself down to whether, under the proved facts, the plaintiff, as a matter of law, was entitled to recover. Under this situation the Supreme Court is empowered to review a decision of the trial court, and determine whether the facts, as a matter of law under the competent proof, entitled plaintiff to recover the sum demanded. (*Becket* v. *Woolworth Co.* 376 Ill. 470; *Rotche* v. *Buick Motor Co.,* 358 id. 507; *Pralle* v. *Metropolitan Life Ins. Co.* 346 id. 58.) The competent evidence in this record shows that the appellant was entitled to recover, and that the appellee had no defense.

The judgments of the Appellate Court for the First District and of the circuit court of Cook county are reversed, and the cause is remanded to the circuit court with directions to enter judgment in favor of the plaintiff for the sum of $3193.

Reversed and remanded, with directions.